

1411994 (Migration) [2015] AATA 3285 (12 August 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Paul Chami

VISA APPLICANT: Mrs Hyrmanova Eliska Chami

CASE NUMBER: 1411994

DIBP REFERENCE(S): OSF2013/097932

MEMBER: Hugh Sanderson

DATE: 12 August 2015

PLACE OF DECISION: Sydney

DECISION: The tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

- cl.300.211 of Schedule 2 to the Regulations;
- cl.300.214 of Schedule 2 to the Regulations;
- cl.300.215 of Schedule 2 to the Regulations;
- cl.300.216 of Schedule 2 to the Regulations; and
- cl.300.221 of Schedule 2 to the Regulations.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration to refuse to grant the applicants Prospective Marriage (Temporary) (Class TO) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants applied for the visas on 7 October 2013. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visas on 27 June 2014 on the basis that the first named applicant did not satisfy cl.300.215, cl.300.216, and cl.300.221 of Schedule 2 to the Regulations because the delegate was not satisfied that at the time of the application and at the time of the decision the parties genuinely intended to marry or genuinely intended to live together as spouses.

BACKGROUND

4. The review applicant was born in Lebanon and is currently 68 years old. He became an Australian citizen in 1967. He has provided to the department a copy of his Australian passport. He was previously married and divorced his wife in 2002. He has six adult children from that relationship, all of whom reside in Australia. He has eight siblings or half-siblings, five who reside in Australia two in Lebanon and one in the Czech Republic.
5. The visa applicant is a citizen of the Czech Republic and is currently 48 years old. She has been married on two previous occasions. She does not have any children. She divorced her first husband in 2002 and then married her second husband on 8 July, 2004. Her second husband was Mike Chami, the younger half-brother of the visa applicant.
6. The parties claimed that they first met each other on 21 March, 2010 when the review applicant was visiting his half-brother and the visa applicant in the Czech Republic. It was claimed that at that time the visa applicant was experiencing relationship problems with her husband. It was claimed that the visa applicant and her husband used the review applicant to help try to mediate a reconciliation between themselves. This was not successful and by joint application to the court the visa applicant divorced her husband on 11 February, 2011. A copy of the divorce has been provided to the department. In that decree, it is stated that the parties had lived separately since May 2010.
7. The parties claimed that they kept in telephone communication with each other and in November 2012 decided that their relationship had turned into love. In January 2013 the review applicant provided funds to the visa applicant to enable her to travel to Australia. Before this happened they claim to have been "symbolically engaged" in February 2013.
8. The visa applicant travelled to Australia between 2 April, 2013 and 26 May, 2013. The parties claimed that they lived together in the review applicant's home over that period, apart from a short holiday they had together to Adelaide. The review applicant travelled to the Czech Republic between 2 October, 2013 and 28 October, 2013.

9. The parties provided various documents to the department in support of the application. This included the following:
- Statements by the parties;
 - Statements by one of the review applicant's brothers and neighbours of the review applicant in support of the application;
 - Evidence of telephone calls between the parties from 2013; and
 - Evidence of money transfers by the review applicant to the visa applicant.
10. The parties were interviewed separately by an officer of the department.
11. The delegate who considered the application noted the following issues:
- There was no independent evidence to support the claim that the parties were in regular communication with each other from 2010 until April 2013;
 - When interviewed, the parties did not provide a plausible explanation of the development of their relationship prior to the visa applicant arriving in Australia in April 2013;
 - There was limited information provided which would indicate the parties were together throughout the time the visa applicant was in Australia between April 2013 and May 2013;
 - There was limited information from the review applicant's family, apart from one statement from a brother, which would indicate that his family know of and are supportive of his relationship with the visa applicant;
 - The circumstances of the visa applicant raised concerns that she did not genuinely intend to live with the review applicant but was seeking to live in Australia to obtain economic and social betterment; and
 - The motivation of the review applicant appeared to stem from feelings of guilt at the way his stepbrother had treated the visa applicant.
12. Taking into account these considerations, the delegate found that the visa applicant did not have a genuine intention to marry the review applicant or genuinely intend to live together as spouses. Accordingly, the delegate found that the visa applicant did not meet the criteria in cl.300.211, cl.300.215, cl.300.216 and cl.300.221 and refused the application.
13. Since the decision refusing the visa, the review applicant has travelled out of Australia from 15 June 2015, returning on 6 July, 2015.

THE HEARING

14. The review applicant appeared before the tribunal on 10 August, 2015 to give evidence and present arguments. The tribunal also received oral evidence from the visa applicant, the eldest brother of the review applicant and the neighbour of the review applicant. The applicant was represented in relation to the review by their registered migration agent who attended the hearing.

15. The review applicant and visa applicant gave consistent information as to various aspects of their relationship. This included details of where they were both living, with whom they were living and their current employment. They provided details of each other's families and other aspects of their personal lives. The review applicant said that he had been providing money to the visa applicant as he feels a responsibility, as her husband, to financially support her. This information was corroborated by the visa applicant. They provided details of their travels together when the review applicant travelled to Europe and Lebanon with the visa applicant. He explained that he had not travelled earlier to be with the visa applicant as he was expecting the hearing before the tribunal to be conducted within a short period of time of filing the review application. As it was, when he did travel overseas, that was the time the tribunal wrote to him to invite him to the hearing.
16. The review applicant explained that he and the visa applicant had an Islamic marriage on 3 May, 2013 as he felt that if they were to live together they should have an Islamic marriage ceremony, even if they did not plan to have a civil ceremony at that time.
17. The visa applicant stated that she had always lived in the Czech Republic. She said that she had previously visited Germany and Austria, but had lived in Prague, including during the period of her first marriage.
18. Both parties explained that the visa applicant was still involved in litigation with her second husband, the review applicant's half-brother, in respect of their family law property settlement. The visa applicant indicated she was hopeful that this would be resolved soon.
19. The review applicant's brother, Mohammed Chami, gave evidence in support of the application. He said that the family in Australia all support the relationship and that he believed that both parties were genuine in their wish to live together. He said that he had not spoken to his half-brother, the former husband of the visa applicant, since their relationship ended. He said that none of the family had any issues with the fact that the review applicant is now in a relationship with the former wife of their half-brother.
20. The review applicant's neighbour, Paul Davies, gave evidence in support of the application. He said that he had met the visa applicant when she was staying with the review applicant in 2013 that he believed that the relationship was genuine. He said that he had remained friends with the visa applicant since she travelled to Australia and they continue to keep in touch through Facebook and other Internet communication. He said that the review applicant often talks about his relationship with the visa applicant and he was aware of their plans for their future together in Australia.
21. For the following reasons, the tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

22. The issue in the present case is whether the parties genuinely intend to marry and live together as spouses.

DOES THE VISA APPLICANT INTEND TO MARRY AN ELIGIBLE PERSON?

23. Clause 300.211 requires that at the time of application the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. The review applicant has provided to the department a copy of his Certificate of Australian Citizenship. Accordingly, the requirements of cl.300.211 are met. Both parties are over the age of 18 and accordingly the requirements of cl.300.214 are met.

DO THE PARTIES GENUINELY INTEND TO MARRY?

24. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period.
25. The parties participated in a religious Islamic wedding in 2013. The parties provided information to the department that at the time of the application they planned to marry each other in Australia. This marriage was tentatively booked for 8 February, 2014. As the application was refused, this ceremony could not take place.
26. The tribunal accepts the evidence of the parties that they still intend to marry after any visa is granted to the visa applicant and she is able to enter Australia.
27. At the time of application the parties had a genuine intention to marry and satisfy the requirements of cl.300.215(a). The proposed date for the marriage is within the visa period as required by cl.300.215(b). Therefore, the requirements of cl.300.215 are met.

DO THE PARTIES GENUINELY INTEND TO LIVE TOGETHER?

28. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). Whilst it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.
29. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the tribunal makes the following findings.
30. The review applicant has regularly sent to the visa applicant money in order to financially support her. He has done this as he feels that it is his obligation, as the visa applicant's husband, to provide financial support to his wife. Details of the money transfers have been provided by the applicant to the tribunal. During the time that they have spent together, they have shared their expenses. The review applicant has met the majority of all expenses for the visa applicant in their travels to Lebanon and other countries out of the Czech Republic.
31. There is limited further information as to other financial aspects of the relationship. As the parties currently live in separate countries, this is not surprising.
32. Overall, the tribunal is satisfied that the financial aspects of the relationship do indicate the parties are in a genuine relationship and genuinely intend to live together as spouses. Only limited weight is put on this aspect of the relationship, however, in light of the fact that the parties live in separate countries.
33. The parties claim that they have been living together over the period the visa applicant visited Australia and on the occasions the review applicant has travelled to Europe. The parties participated in an Islamic religious marriage ceremony on 3 May, 2013 as the review

applicant felt more comfortable living with the visa applicant if they had participated in this marriage ceremony. When the parties travelled to Lebanon to spend time with the review applicant's family there, they rented an apartment or stayed in a hotel as they desired their own privacy. The tribunal accepts the evidence that the parties did established a household over the periods they were living in the same countries. This aspect of the relationship, however, can only be given limited weight as the parties have resided primarily in separate countries and only spent limited time together.

34. The parties have provided substantial information which indicates that the relationship they have is recognised by friends and family members as being genuine. The parties travelled together to Lebanon to spend time with the review applicant's family there. The tribunal accepts the evidence given by the review applicant's brother, Mohammed Chami, that the other members of his family, including the review applicant's children, recognise the relationship as being genuine and are supportive of that relationship. This is despite the fact that the visa applicant was previously the wife of the review applicant's half-brother. This issue is discussed further below.
35. Overall, the tribunal is satisfied that the parties represent themselves to other people as being engaged to be married and that the relationship is recognised by those friends and family members as being genuine. The parties set out details as to their future plans for their life together in Australia, including their intention to marry as soon as possible.
36. The parties provided evidence of their regular telephone and internet communication with each other. This was corroborated by other family members and friends who confirmed they were aware of the regular calls the parties had with each other. The parties were also able to provide information about the lives of each other indicating that they were in regular communication with each other.
37. The parties had been in a relationship now for more than two years. Since committing to the relationship, the visa applicant has travelled to Australia on one occasion and the review applicant has travelled to Europe on two occasions. The tribunal accepts the evidence of the review applicant that he had intentions to travel to Europe to be with the visa applicant earlier, however, he anticipated an earlier hearing before the tribunal and so delayed any further travel there.
38. The parties set out their plans for their future together, including the anticipated employment the visa applicant may be able to obtain in Australia and their plans for where they intend to live. Overall, the tribunal finds the parties provide each other a degree of companionship and emotional support which would be expected in a genuine and continuing relationship.
39. One of the significant issues of this application is the fact that the visa applicant was previously married to the review applicant's half-brother. Although the circumstances of the development of the relationship are in usual, the tribunal accepts that the review applicant was originally trying to mediate a reconciliation between his half-brother and the visa applicant. During this time, he developed an understanding of the personality of the visa applicant and after her relationship with his half-brother came to an end their own relationship developed.
40. Although the fact that the visa applicant was previously in a relationship with the review applicant's half-brother is unusual, the tribunal accepts the evidence given by the review applicant and his oldest brother that his relationship with the visa applicant is accepted and approved of by them. The visa applicant remains involved in continuing litigation with her former husband with respect to the property settlement following the breakdown of their relationship. It is to be expected that the visa applicant's former husband would be bitter that

the visa applicant is in a relationship with his half-brother and may try to cause problems for the visa applicant.

41. The tribunal has considered all the evidence as to the relationship both individually and cumulatively. The tribunal is satisfied that when considered as a whole the parties do genuinely intend to marry and live together as spouses. They have addressed the more unusual aspects of their relationship with their relatives in the tribunal accepts that the relationship between the parties is accepted by those relatives. This has caused some problems between the review applicant's family and his half-brother, however, this does not undermine the genuineness of the relationship between the parties.
42. Accordingly, the tribunal is satisfied that at the time of application the parties did a genuine intention to live together as spouses, and therefore cl.300.216 is met.

DO THE PARTIES CONTINUE TO MEET TIME OF APPLICATION REQUIREMENTS?

43. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses.
44. As set out above, the tribunal is satisfied that the visa applicant has met the time of application criteria. The tribunal is also satisfied that the applicant continues to meet these criteria. Accordingly, cl.300.221 is met.
45. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

46. The tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
 - cl.300.211 of Schedule 2 to the Regulations;
 - cl.300.214 of Schedule 2 to the Regulations;
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1. Hugh Sanderson
Member